No. 14-8358

IN THE

Supreme Court of the United States

AVONDALE LOCKHART,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 14, 2015
CERTIORARI GRANTED MAY 26, 2015

TABLE OF APPENDICES

Page

APPENDIX A RELEVANT DOCKET ENTRIES.... 1

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 16, 2014..... 8

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 15, 2014 9

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, FILED FEBRUARY 13, 2013. 25

APPENDIX E — INDICTMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, FILED MARCH 24, 2011. 39

APPENDIX F — TRANSCRIPT OF SENTENCING IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED FEBRUARY 1, 2013 43

APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, NO. 2013-602

Date Filed	#	Docket Text
2/21/2013	1	NOTICE OF CRIMINAL APPEAL, with district court docket, on behalf of Appellant Avondale Lockhart, FILED. [851902] [13-602] [Entered: 02/21/2013 10:15 AM]
6/26/2013	26	APPENDIX, volume 1 of 1, (pp. 1-109), on behalf of Appellant Avondale Lockhart, FILED. Service date 06/26/2013 by US mail, CM/ECF. [976391] [13-602] [Entered: 06/26/2013 04:39 PM]
6/26/2013	27	BRIEF, on behalf of Appellant Avondale Lockhart, FILED. Service date 06/26/2013 by CM/ECF, US mail. [976395] [13-602] [Entered: 06/26/2013 04:40 PM]
9/25/2013	47	BRIEF, on behalf of Appellee USA United States of America, FILED. Service date 09/25/2013 by CM/ECF. [1051213] [13-602] [Entered: 09/25/2013 04:20 PM]

10/15/2013	57	REPLY BRIEF, on behalf of Appellant Avondale Lockhart, FILED. Service date 10/15/2013 by CM/ECF, US mail. [1066135] [13-602] [Entered: 10/15/2013 04:38 PM]
1/14/2014	69	CASE, before RAK, Ch. J., CJS, RJL, C.JJ., HEARD.[1133306] [13-602] [Entered: 01/14/2014 11:32 AM]
5/15/2014	77	OPINION, the district court judgment is affirmed, by RAK, CJS, RJL, FILED. [1225104] [13-602] [Entered: 05/15/2014 09:37 AM]
5/15/2014	81	JUDGMENT, FILED. [1225682] [13-602] [Entered: 05/15/2014 02:57 PM]
6/3/2014	86	MOTION ORDER, granting motion to extend time until 06/13/2014, to file a petition for rehearing or rehearing en banc [82] filed by Appellant Avondale Lockhart, by RJL, FILED. [1238948] [86] [13-602] [Entered: 06/03/2014 10:35 AM]
6/13/2014	87	PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant Avondale Lockhart, FILED. Service date 06/13/2014 by CM/ECF, US mail. [1248253] [13-602] [Entered: 06/13/2014 02:22 PM]

Appendix A

10/16/2014	91	ORDER, petition for rehearing en banc denied, FILED. [1345940] [13-602] [Entered: 10/16/2014 11:34 AM]
10/23/2014	92	JUDGMENT MANDATE, ISSUED. [1351937] [13-602] [Entered: 10/23/2014 10:23 AM]
2/9/2015	95	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 02/09/2015, U.S. Supreme Court docket #14-8358, RECEIVED. [1435699] [13-602] [Entered: 02/10/2015 03:30 PM]
5/26/2015	96	U.S. SUPREME COURT NOTICE, dated 05/26/2015, U.S. Supreme Court docket # 14-8358, stating the petition for writ of certiorari is granted, RECEIVED. [1517620] [13-602] [Entered: 05/26/2015 02:54 PM]

Appendix A

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK (BROOKLYN), CRIMINAL DOCKET FOR CASE #: 1:11-cr-00231-SJ-1

Date Filed	#	Docket Text
1/24/2011	1	SEALED COMPLAINT as to Avondale Lockhart (1). (DiLorenzo, Krista) [1:11-mj-00074-JMA] (Entered: 01/25/2011)
3/24/2011	13	INDICTMENT as to Avondale Lockhart (1) count(s) 1-2. (Attachments: # 1 Criminal Information Sheet) (Siegfried, Evan) (Entered: 03/25/2011)
3/6/2012	30	Minute Entry for proceedings held before Magistrate Judge Marilyn D. Go: Change of Plea Hearing as to Avondale Lockhart held on 3/6/2012. Appearances: AUSA Jessica Reid and Def counsel Mildred Whalen. Case called. Deft sworn, informed of rights and waives trial before District Court. Deft enters a guilty plea to count 2 of the Indictment.
12/13/2012	44	SENTENCING MEMORANDUM by Avondale Lockhart (Whalen, Mildred) (Entered: 12/13/2012)

1/11/2013	46	SENTENCING MEMORANDUM by USA as to Avondale Lockhart (Cruz Melendez, Maria) (Entered: 01/11/2013)
1/17/2013	47	Letter *in Connection with January 18, 2013 Sentencing Regarding Letter from the Federal Bureau of Prisons* as to Avondale Lockhart (Attachments: # 1 Enclosure) (Cruz Melendez, Maria) (Entered: 01/17/2013)
1/17/2013	48	SENTENCING MEMORANDUM by Avondale Lockhart (Whalen, Mildred) (Entered: 01/17/2013)
1/17/2013	50	SENTENCING MEMORANDUM by Avondale Lockhart (Whalen, Mildred) (Entered: 01/17/2013)
2/1/2013	51	Minute Entry for proceedings held before Judge Sterling Johnson, Jr: Sentencing held on 2/1/2013 for Avondale Lockhart (1), Count(s) 1, Count(s) 2, 120 months imprisonment followed by 10 years supervised release and $100.00 special assessment fee. Dismissed by Government's motion in open court; The court recommends to BOP that defendant receive mental health and treatment for sexual disorders while in custody and as

a special condition of supervision. Special conditions of supervision include: no association with children as specified by probation, polygraph testing and limitation of computer use as recommended, determined and defined by probation and goals of the treatment program. Forfeiture order. Open charges are dismissed upon motion by the government. Defendant is to self-surrender to the institution designated by the Marshals of this District by noon on 4/1/13. The Court accepts the plea taken before Magistrate Judge Go on 3/6/12. (Court Reporter Fred Guerino) (Guzzi, Roseann) (Entered: 02/04/2013)

2/11/2013	52	SENTENCING MEMORANDUM by Avondale Lockhart (Whalen, Mildred) (Entered: 02/11/2013)
2/13/2013	54	JUDGMENT dated 2/11/13 as to Avondale Lockhart (1), defendant is sentenced to Count(s) 2, 120 months imprisonment followed by 10 years supervised release and $100.00 special assessment fee; Count(s) 1, dismissed by Government's motion in open court; the court recommends to the BOP: designation to a Care Level III medical facility close to the state of Florida.

Defendant is also to receive mental health treatment for sexual disorders. The defendant shall surrender for service of sentence at the institution designed by the BOP by 2pm on 4/1/13. Special conditions of supervision. Attached order of forfeiture. (Ordered by Judge Sterling Johnson, Jr on 2/11/2013). Ordered by Judge Sterling Johnson, Jr on 2/11/2013. (Attachments: # 1 Final Order of Forfeiture) (Guzzi, Roseann) (Entered: 02/13/2013)

2/15/2013	57	NOTICE OF APPEAL by Avondale Lockhart re 54 Judgment. No fee paid; defendant is represented by Federal Defenders counsel. Service done electronically. (Manuel, Germaine) (Entered: 02/15/2013)
10/23/2014	60	MANDATE of USCA (certified copy) as to Avondale Lockhart. It is Ordered that the judgment of the District Court is AFFIRMED in accordance with the Opinion of this Court. Issued as Mandate: 10/23/14. (Attachments: # 1 Opinion) (McGee, Mary Ann) (Entered: 10/23/2014)

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 16, 2014

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of October, two thousand fourteen,

UNITED STATES OF AMERICA,

Appellee,

v.

AVONDALE LOCKHART,

Defendant-Appellant.

ORDER

Docket No.: 13-602

Appellant Avondale Lockhart filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
s/ Catherine O'Hagan Wolfe

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 15, 2014

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2013

January 14, 2014, Argued May 15, 2014, Decided

Docket No. 13-602-cr

UNITED STATES OF AMERICA,

Appellee,

— v. —

AVONDALE LOCKHART,

Defendant-Appellant.

Before: KATZMANN, *Chief Judge*, STRAUB and LOHIER, *Circuit Judges.*

KATZMANN, *Chief Judge*:

In this case, we must decide whether a sentencing provision that provides for a ten-year mandatory minimum term of imprisonment if a defendant was previously convicted "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual

conduct involving a minor or ward," 18 U.S.C. § 2252(b)(2), requires that an "aggravated sexual abuse" or "sexual abuse" conviction involve a minor or ward, or whether only "abusive sexual conduct" is modified by the phrase "involving a minor or ward," such that a sexual abuse conviction involving an adult victim constitutes a predicate offense. We conclude that the statutory text and structure indicate that the latter reading is correct and therefore affirm the district court's imposition of a ten-year sentence on Defendant-Appellant Avondale Lockhart.

Background

In June 2010, after receiving information indicating that Lockhart had transferred money to a distributor of child pornography, federal agents initiated an undercover operation, in which they solicited Lockhart to purchase videos portraying child pornography from an agent-run service. Lockhart requested a number of videos from the agents, and on July 13, 2010, after obtaining a search warrant, the agents conducted a controlled delivery of the package ostensibly containing the videos Lockhart had ordered. Once Lockhart accepted the package, the agents executed the search warrant and seized Lockhart's laptop and external hard drive, which together contained over 15,000 images and at least nine videos depicting child pornography.

As a result of this investigation, Lockhart was indicted on March 24, 2011, on two counts: (1) attempted receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2), based on his attempted purchase of videos containing

child pornography from the undercover agents; and (2) possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), based on the images and videos already on his computer and hard drive. On March 6, 2012, pursuant to a plea agreement, Lockhart pleaded guilty to count two of the indictment in the United States District Court for the Eastern District of New York. Count one of the indictment was thereafter dismissed.

Lockhart had previously been convicted in state court in April 2000 of first degree sexual abuse, in violation of New York Penal Law § 130.65(1). The arrest report from this earlier conviction alleges that Lockhart pinned down his fifty-three-year old girlfriend, ripped off her underpants, and attempted to penetrate her vagina with his penis. Lockhart received a sentence of five years' probation and was classified as a level-one sex offender as a result of this conviction.

The Presentence Report ("PSR") prepared for Lockhart's sentencing calculated a recommended sentencing range of 78-97 months under the U.S. Sentencing Guidelines. However, the PSR adopted the government's position that Lockhart was subject to a mandatory minimum sentence of ten years under 18 U.S.C. § 2252(b)(2), which requires such a term of imprisonment if a person violates § 2252(a)(4) and "has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252(b)(2). The PSR thus recommended an effective range under the Sentencing Guidelines of 120 months due to Lockhart's

prior conviction for sexual abuse in the first degree. In his sentencing submission, Lockhart argued that his prior conviction could not support the imposition of the mandatory minimum sentence because his sexual abuse offense did not involve a minor. The district court rejected Lockhart's position, concluding that the mandatory minimum applied, and imposed a ten-year sentence, to be followed by ten years' supervised release. This appeal followed.

Discussion

As discussed above, Lockhart pleaded guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4) and was sentenced pursuant to § 2252(b)(2). While § 2252(b)(2) generally requires no minimum sentence, in certain circumstances the statute provides for a mandatory minimum sentence of ten years. In its entirety, § 2252(b)(2) provides:

> Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice), or *under*

> *the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor* or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. § 2252(b)(2) (emphasis added).[1]

Here, the district court found that Lockhart was subject to the mandatory minimum based on his prior state conviction for sexual abuse of an adult woman. On appeal, Lockhart challenges that conclusion, arguing that § 2252(b)(2)'s mandatory minimum does not apply if the victim of the prior sexual abuse offense is an adult, rather than a minor. Thus, the sole issue on appeal is whether the phrase "involving a minor or ward" modifies an entire category of state-law crimes--those "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct"--or whether "involving a minor or ward" modifies only its immediately preceding antecedent, "abusive sexual conduct." "We review de novo all questions of law relating to the district court's application of a federal

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1. Language identical or similar to the key phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" is used in four other sentencing provisions in Chapter 110 of Title 18 of the United States Code. *See* 18 U.S.C. §§ 2251(e) (referring to "abusive sexual contact," rather than "conduct"), 2252(b)(1), 2252A(b)(1), 2252A(b)(2).

sentence enhancement." *United States v. Beardsley*, 691 F.3d 252, 257 (2d Cir. 2012).[2]

In interpreting § 2252(b)(2), "[w]e start, as we must, with the language of the statute," giving the statutory terms their "'ordinary or natural' meaning." *Bailey v. United States*, 516 U.S. 137, 144-45, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 228, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993)), *superseded by statute on other grounds*, Pub. L. No. 105-386, 112 Stat. 3469 (1998) (codified as amended at 18 U.S.C. § 924(c)). Where, as here, the plain meaning is not pellucid, we can draw upon a variety of interpretive tools, including canons, statutory structure, and legislative history, to discern meaning. As to canons, we first consider which rule of statutory construction should inform our understanding of the phrase "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor": the last antecedent rule or the series qualifier canon.

"Under the last antecedent rule, 'a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *United States*

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2. As part of his plea agreement, Lockhart waived his right to appeal his sentence but excluded from that waiver the issue now before the Court. On March 26, 2013, the government filed a motion to dismiss Lockhart's appeal based on this waiver. However, on July 8, 2013, the government moved to withdraw its motion to dismiss, acknowledging that the instant issue fell outside the scope of the appeal waiver. The Court granted the government's motion to withdraw its prior motion on July 9, 2013. Therefore, waiver is not at issue, and we proceed to the merits of Lockhart's claim.

v. Kerley, 416 F.3d 176, 180 (2d Cir. 2005) (ellipsis omitted) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003)). Although the "rule is not an absolute and can assuredly be overcome by other indicia of meaning," the last antecedent rule generally applies absent a contrary indication of meaning. *Barnhart*, 540 U.S. at 26 (citing 2A N. Singer, *Sutherland on Statutory Construction* § 47.33 at 369 (6th rev. ed. 2000)). Relying on this presumption, the government contends that, as the district court concluded, the phrase "involving a minor or ward" modifies only "abusive sexual conduct," and therefore Lockhart's prior state conviction for sexual abuse triggers the imposition of § 2252(b)(2)'s ten-year mandatory minimum sentence, regardless of the fact that the victim of his prior offense was an adult.

Lockhart argues in favor of the application of the contrary series qualifier canon of statutory construction, which "provides that a modifier at the beginning or end of a series of terms modifies all the terms." *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012). The series qualifier canon applies where "[t]he modifying clause appear[s] . . . at the end of a single, integrated list," *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 344 n.4, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005), and where the modifying clause "undeniably applies to at least one antecedent, and . . . makes sense with all," *United States v. Bass*, 404 U.S. 336, 339-40, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971). Lockhart contends that this canon should be applied, as the phrase "involving a minor" appears at the end of the integrated list of three antecedents, all of which would "make[] sense" if limited by this modifying clause.

Appendix C

Lockhart and the government put forth various arguments to support reliance on their preferred canons. We are not fully persuaded that either canon applies unambiguously based on the language and structure of this statutory phrase alone. For example, while Lockhart is correct that the modifying clause "involving a minor" appears at the end of this particular list of state-law crimes, this is not the prototypical situation in which the series qualifier canon is applied, since the list itself falls in the middle of a longer list of qualifying predicate crimes; that is, the modifier does not end the list in its entirety. *Cf. Bass*, 404 U.S. at 337 (applying the series qualifier rule to the phrase "receives, possesses, or transports in commerce or affecting commerce" where that series provided the sole list of conduct prohibited by the statute). On the other hand, the inclusion of the word "or" before "abusive sexual conduct" and then again before "the production of child pornography" in the immediately following clause suggests that the state sexual abuse crimes are set off as a separate list within the larger list, lending some support to Lockhart's preferred reading.[3]

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3. Although we do not deem this dispositive on its own, we note that 18 U.S.C. § 2251(e)'s similar language differs from that used in § 2252(b)(2) in a manner that sheds some light on the present dispute. Specifically, § 2251(e) imposes a heightened sentence on defendants convicted of prior crimes "under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production . . . of child pornography." In this context, aggravated sexual abuse, sexual abuse, and abusive sexual conduct do not form their own separate list ending in a common modifier; rather, "abusive sexual contact involving a minor or ward" is the third element of a four-element list ending

We are not persuaded by Lockhart's position that the three types of state sexual abuse offenses constitute a related "continuum of conduct," each element of which should be modified by the phrase "involving a minor" to maintain a common limitation on the entire continuum. Br. for Def.-Appellant at 20. Such a reading would eliminate any distinction between "sexual abuse involving a minor" and "abusive sexual conduct involving a minor," since "abusive sexual conduct involving a minor" seemingly would encompass anything that constitutes "sexual abuse involving a minor," as well as, for example, other sexual conduct that may be criminalized only when the victim is a child. *See, e.g., United States v. Hubbard*, 480 F.3d 341 (5th Cir. 2007) (finding a conviction for "soliciting sex from a person the Defendant believed to be under sixteen" to constitute a conviction relating to "abusive sexual conduct involving a minor"). Thus, Lockhart's proposed reading may run up against the principle of statutory interpretation that "[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Bailey*, 516 U.S. at 146.

At the same time, neither are we convinced by the government's contention that the fact that there is no comma separating "abusive sexual conduct" from the modifier "involving a minor or ward" itself proves that "involving a minor or ward" should be read together with "abusive sexual conduct," but not with "aggravated

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in "sex trafficking of children." We assume that Congress intended § 2251(e)'s similar language to be read in tandem with § 2252(b)(2). Thus, the addition of a fourth element in § 2251(e) after the modifier suggests that the series qualifier canon should not be applied.

sexual abuse" or "sexual abuse." We have previously acknowledged that "[o]ne of the methods by which a writer indicates whether a modifier that follows a list of nouns or phrases is intended to modify the entire list, or only the immediate antecedent, is by punctuation--specifically by whether the list is separated from the subsequent modifier by a comma." *Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781-82 (2d Cir. 2013). However, while a comma may be a helpful aid to statutory interpretation, inclusion of such a comma is not a hard-and-fast rule of grammar. *See Bass*, 404 U.S. at 340 n.6 ("[M]any leading grammarians, while sometimes noting that commas at the end of series can avoid ambiguity, concede that use of such commas is discretionary."). Here, inserting a comma before "involving a minor or ward" might confuse rather than clarify the meaning of this provision because, as discussed above, the relevant series of state sexual abuse offenses is separated only by a comma from a continuing list of state child pornography offenses. In this case, then, adding a comma before "involving a minor or ward" might make the modifying clause appear to be a separate element in a longer list and would, in any case, be grammatically unnecessary. Accordingly, here, basing our analysis "only on punctuation is necessarily incomplete and runs the risk of distorting [the] statute's true meaning." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993). While the lack of a separating comma may run contrary to Lockhart's interpretation, it is not dispositive of our reading of § 2252(b)(2). *See United States v. Rezin*, 322 F.3d 443, 448 (7th Cir. 2003).

Ultimately, we cannot definitively determine by applying the canons whether the phrase "involving a minor or ward" modifies the entire category of state-law sexual abuse crimes or only "abusive sexual conduct." While the government's reading appears to have greater support in the relevant clause, lingering ambiguity prevents us from concluding on this basis alone that the government's interpretation is the correct one. However, this ambiguity does not end our inquiry into the meaning of the statutory text. Rather, it is well established that statutory phrases should not be construed "in isolation; we read statutes as a whole." *Samantar v. Yousuf*, 560 U.S. 305, 319, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010) (quoting *United States v. Morton*, 467 U.S. 822, 828, 104 S. Ct. 2769, 81 L. Ed. 2d 680 (1984)).

Accordingly, we look to the remainder of § 2252(b)(2) and consider whether its overall scheme may shed light on what state-law sexual abuse offenses Congress intended to include as predicate offenses for imposition of the mandatory minimum sentence. In addition to imposing a ten-year term of imprisonment for predicate violations of state law, § 2252(b)(2) also provides for such a sentence if the defendant has a prior conviction under federal law for a violation under "[chapter 110], chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice)." The referenced statutes prohibit sexual conduct, including conduct that may have both minor and adult victims. *See* 18 U.S.C. §§ 1460-1470 (Chapter 71, offenses relating to obscene matter, materials or language); 18 U.S.C. §§ 2241-2248 (Chapter 109A, sexual abuse of adults or minors); 18

U.S.C. §§ 2251-2260A (Chapter 110, sexual exploitation and other abuse of minors); 18 U.S.C. §§ 2421-2428 (Chapter 117, transportation of adults or minors for illegal sexual activity and related crimes); 10 U.S.C. § 920 (rape and sexual assault under the Uniform Code of Military Justice). Importantly, § 2252(b)(2) does not specify that a conviction under a federal statute must involve a minor; a violation of any of these statutory provisions constitutes a predicate offense for the application of § 2252(b)(2)'s mandatory minimum sentence, regardless of the age of the victim.

Looking at § 2252(b)(2) as a whole, we find, as a number of other circuits have explained, that "it would be unreasonable to conclude that Congress intended to impose the enhancement on defendants convicted under federal law, but not on defendants convicted for the same conduct under state law." *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011); *see also Hubbard*, 480 F.3d at 350 ("Read in context, the phrase 'involving a minor' modifies only 'abusive conduct.' We are persuaded this was the intent of Congress, not simply because of the placement of the phrase 'involving a minor,' but because the enumeration of prior federal offenses that will also give rise to a mandatory minimum sentence expressly includes sexual abuse of adults or minors."); *Rezin*, 322 F.3d at 448 ("[I]t would have been strange had Congress on the one hand authorized heavier punishment for offenders who had a prior *federal* conviction for a sexual crime whether or not it involved a minor, and on the other hand insisted that if the prior conviction had been for a state offense, even one identical to one of the enumerated

federal offenses, the victim had to be a minor."); *cf. United States v. Sinerius*, 504 F.3d 737, 740 (9th Cir. 2007) (assuming, without analysis, that "the terms 'aggravated sexual abuse,' 'sexual abuse,' and 'abusive sexual conduct involving a minor' under § 2252A(b)" set forth distinct offenses); *United States v. West*, 333 F. App'x 494 (11th Cir. 2009) (per curiam) (holding that it was not plain error to apply the mandatory minimum to a prior conviction where the state law at issue did not always require an actual minor victim). This reasoning compels us to conclude that "involving a minor or ward" modifies only prior state convictions for "abusive sexual conduct," not those for "sexual abuse" or "aggravated sexual abuse," each of which would constitute a predicate *federal* offense if committed against an adult or a child.

We acknowledge that the Sixth, Eighth and Tenth Circuits have reached the opposite conclusion, namely, that the phrase "involving a minor or ward" modifies all three categories of state sexual abuse crimes. However, the Eighth and Tenth Circuits have drawn this conclusion without elaborating on their reasoning. Indeed, these circuits appear merely to have assumed that a prior state-law sexual abuse conviction requires a minor victim for purposes of the sentencing enhancement, an assumption that made little difference in those cases since the predicate violations at issue involved minor victims. *See United States v. Hunter*, 505 F.3d 829, 831 (8th Cir. 2007) (relying on this assumption); *United States v. McCutchen*, 419 F.3d 1122, 1125 (10th Cir. 2005) (considering whether "the statute under which [a] prior state conviction arose must have included as an element the victim's status as a

minor" for the conviction to fall within the scope of any of the three categories in § 2252(b)(2)). The Sixth Circuit has reached this conclusion most explicitly, although it did so because it found that another panel of that court had "already considered the proper construction of the statutory language at issue," and that that prior decision bound the current panel, even though the earlier opinion did not engage in any express analysis of the statutory language. *United States v. Mateen*, 739 F.3d 300, 304-05 (6th Cir. 2014) (citing *United States v. Gardner*, 649 F.3d 437 (6th Cir. 2011)), *reh'g en banc granted, opinion vacated* (Apr. 9, 2014). We are not compelled to follow such unexplored assumptions in coming to our conclusion here.[4]

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4. In *United States v. Beardsley*, 691 F.3d 252 (2d Cir. 2012), this Court commented that for a state-law conviction to trigger the analogous sentencing enhancement under 18 U.S.C. § 2252A(b)(1), "the statute underlying the prior conviction must itself relate to sexual abuse of minors for the enhancement to apply." *Id.* at 269. However, this statement is dictum and does not bind this panel. At issue in *Beardsley* was whether to take a categorical approach in determining whether a state-law conviction for endangering the welfare of a child was a predicate offense under § 2252A(b)(1) sentencing enhancement. Beardsley's actual conduct underlying the conviction constituted "abusive sexual conduct involving a minor," so that case turned on the scope of the conduct prohibited by the statute, not whether the conviction must involve a minor. *See id.* at 256. This understanding of *Beardsley* was confirmed in a recent decision of this Court, in which we stated that "[w]e did not expressly identify in *Beardsley* that the three types of predicate offenses are distinct, nor did we address whether the phrase 'involving a minor or ward' modifies only 'abusive sexual conduct' as other Courts of Appeals have done." *United States v. Barker*, 723 F.3d 315, 322 (2d Cir. 2013) (per curiam). Thus, we are not bound by *Beardsley*'s suggestion that "involving a minor" modifies each term.

Appendix C

Resisting the conclusion that Congress intended to treat state and federal predicate crimes similarly, Lockhart argues that the relevant pattern in § 2252(b)(2) is instead that Congress limited other state-law predicate offenses in this and related sentencing provisions to those involving children. *See, e.g.*, 18 U.S.C. § 2252(b)(2) (including state offenses relating to "child pornography"); 18 U.S.C. § 2251(e) (including state offenses relating to "sex trafficking of children"). According to Lockhart, then, not reading "aggravated sexual abuse" and "sexual abuse" to be limited to those convictions "involving a minor or ward" would create an inconsistency among the treatment of different state-law offenses. While there is some logic to this position, we do not think that this theory is more reasonable than the assumption that Congress would intend for courts to treat prior sexual abuse convictions similarly, regardless of whether the conviction was under federal or state law. Lockhart's interpretation is further undermined when one compares the language used to describe the universe of state sexual abuse convictions in § 2252(b)(2) with the federal analogs in 18 U.S.C. §§ 2241 (aggravated sexual abuse), 2242 (sexual abuse), and 2243 (sexual abuse of a minor or ward). Under the federal statutory scheme, adult and minor victims are included under the first two provisions, while § 2243 covers only minors and wards. Although the language used in § 2252(b)(2) is not identical to these statutory titles, it nonetheless suggests that Congress intended to impart a similar structure to state-law predicate offenses for purposes of this sentencing enhancement, and the pattern Lockhart perceives among other state-law offenses does not necessarily apply here.

We furthermore note that the brief legislative history of this provision does not alter our conclusion. *See* S. Rep. No. 104-358, 104th Cong., 1996 WL 506545, at *9 (1996) (stating only that the penalties under §§ 2252 and 2252A would provide for a mandatory minimum sentence for "a repeat offender with a prior conviction under chapter 109A or 110 of title 18, or under any State child abuse law or law relating to the production, receipt or distribution of child pornography"). Likewise, resort to the rule of lenity is inappropriate where, as here, "the statutory text allows us to make far more than 'a guess as to what Congress intended.'" *DePierre v. United States*, 131 S. Ct. 2225, 2237, 180 L. Ed. 2d 114 (2011) (quoting *Reno v. Koray*, 515 U.S. 50, 65, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995)).

Accordingly, because we conclude that "involving a minor or ward" modifies only "abusive sexual conduct" and not "sexual abuse" or "aggravated sexual abuse," we find that the district court correctly applied § 2252(b)(2)'s sentencing enhancement in light of Lockhart's prior conviction for sexual abuse.

Conclusion

For the foregoing reasons, the judgment and sentence of the district court are affirmed.

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, FILED FEBRUARY 13, 2013

UNITED STATES DISTRICT COURT
Eastern District of New York

UNITED STATES OF AMERICA

v.

AVONDALE LOCKHART

JUDGMENT IN A CRIMINAL CASE

Case Number: 11-CR-0231-SJ

USM Number: 78979-053

Mildred Whalen, One Pierrepont Plz, Bklyn NY 11201
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) two of a two-count indictment.

☐ pleaded nolo contendere to count(s) which was accepted by the court. _____

☐ was found guilty on count(s) after a plea of not guilty.
The Court accepts the plea taken before Magistrate Judge Go on 3/6/2012.

Appendix D

The defendant is adjudicated guilty of these offenses:

Title & Section
18USC2252(a)(4) and (b)(2)

Nature of Offense
Possession of child pornography

Offense Ended
7/13/2011

Count
2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) all open ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Appendix D

2/1/2013
Date of Imposition of Judgment

/s/ (SJ)
Signature of Judge

STERLING JOHNSON, JR., U.S.D.J.
Name of Judge Title of Judge

2/11/2013
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One hundred twenty (120) months.

☑ The court makes the following recommendations to the Bureau of Prisons:

Designation to a Care Level III medical facility close to the state of Florida. Defendant is also to receive mental health treatment and treatment for sexual disorders.

* * *

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 4/1/2013

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Ten (10) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

* * *

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

* * *

Appendix D

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment; notification is not possible, then within forty eight hours after such change;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix D

SPECIAL CONDITIONS OF SUPERVISION

- the defendant is not to use a computer, Internet capable device, or similar electronic device to access pornography or any kind while in sex offender treatment, unless permitted by the sex offender treatment program. The term "pornography" shall include images or video(s) of adults or minors engaged in "sexually explicit conduct" as that term is defined in Title 18, United States Code, Section 2256(2). The defendant shall also not use a computer, Internet capable device or similar electronic device to view images of naked children. The defendant shall not use his/her computer to view pornography or images of naked children stored on related computer media, such as CD's or DVD's, and shall not communicate via his/her computer with any individual or group who promotes the sexual abuse of children. This condition is recommended due to the conduct comprising the instant offense, and the type of treatment in which the defendant will be engaged during his term of supervised release. Specifically, while participating in sex offender specific mental health treatment, viewing pornography of any kind, including naked children, can be detrimental to and undermine the objectives of treatment. Moreover, should sex offender specific mental health treatment be paired with therapeutic polygraph examinations, viewing pornography of any kind, including images of naked children, can interfere with the testing objectives, eliciting inconclusive test results, again undermining rehabilitation and treatment, which are fundamental goals of sentencing and supervised release. Therefore, while in sex offender mental health treatment, if it is a condition of treatment

that the defendant not view adult pornography, i.e., images or video(s) of adults engaged in "sexually explicit conduct" as that term is defined in Title 18, United States Code, Section 2256(2) or naked children, if the defendant views such pornography or images of naked children it will be considered a violation of the conditions of his sex offender mental health treatment and his supervised release. The viewing of child pornography at any time during supervised release will be considered a violation of supervised release as well as a violation of law.

- the defendant shall also cooperate with the U.S. Probation Department's Computer and Internet Monitoring program. Cooperation shall include, but not be limited to, identifying computer systems, Internet capable devices, and/or similar electronic devices the defendant has access to, and allowing the installation of monitoring software/ hardware on said devices, at the defendant's expense. The defendant shall inform all parties that access a monitored computer, or similar electronic device, that the device is subject to search and monitoring. The defendant may be limited to possessing only one personal internet capable device, to facilitate our department's ability to effectively monitor his/her Internet related activities. The defendant shall also permit random examinations of said computer systems, Internet capable devices, similar electronic devices, and related computer media, such as CD's, under his/her control.

Defendant shall participate in a mental health treatment program, which may include participation in a treatment program for sexual disorders, as approved by the

Probation Department. The defendant shall contribute to the cost of such services rendered and/or any psychotropic medications prescribed to the degree he is reasonably able, and shall cooperate in securing any applicable third-party payment. The defendant shall disclose all financial information and documents to the Probation Department to assess his ability to pay. As part of the treatment program for sexual disorders, the defendant shall participate in a polygraph examination(s) to obtain information necessary for risk management and correctional treatment.

Defendant shall not associate with any child(ren) under the age of 18, unless a responsible adult is present and he has prior approval from the Probation Department.

Defendant shall comply with the sex offender registration requirements mandated by law.

The defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found; the search must also be conducted in a reasonable manner and at a reasonable time; failure to submit to a search may be grounds for revocation; the defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

If deported, the defendant may not re-enter the United States illegally.

Appendix D

The defendant shall not possess a firearm; ammunition, or destructive device.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$

* * *

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

* * *

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Appendix D

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

(a) a Hewlett Packard g60 laptop computer; and (b) a Toshiba 500 GB external hard drive.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

ADDITIONAL FORFEITED PROPERTY

SEE ATIACHED FINAL ORDER OF FORFEITURE; (a) a Hewlett Packard g60 laptop computer; and (b) a Toshiba 500 GB external hard drive.

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

AVONDALE LOCKHART,

Defendant.

FINAL ORDER OF FORFEITURE

CR-11-231 (SJ)

WHEREAS, on or about March 6, 2012, the defendant, AVONDALE LOCKHART, entered a plea of guilty to Count Two of an Indictment charging a violation of 18 U.S.C. § 2252(a)(4)(B); and

WHEREAS, the defendant consented to the forfeiture of all his right, title and interest in the following items: (a) a Hewlett Packard g60 laptop computer; and (b) a Toshiba 500 GB external hard drive, seized from the defendant (the "Forfeited Property"), pursuant to 18 U.S.C. § 2253, as property that constitutes (a) any visual depiction described in 18 U.S.C. §§ 2251, 2251A, 2252, 2252A, 2252B or 2260, and any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped and received in violation of the offenses charged; (b) any property, real and personal, constituting or traceable to gross profits and other proceeds obtained from such

offenses; and/or (c) any property, real and personal, used or intended to be used to commit or to promote the commission of said offenses or property traceable to such property, as well as all substitute assets, pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p);

WHEREAS, on or about March 21, 2012, this Court entered a Preliminary Order of Forfeiture, pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p), requiring the defendant to forfeit all his right, title and interest in the Forfeited Property;

WHEREAS, legal notice of forfeiture was published in this district on the official government website, www.forfeiture.gov, for at least thirty (30) consecutive days beginning on April 17, 2012 and ending on May 16, 2012; and

WHEREAS, no third-party has filed with the Court any petition or claim in connection with the Forfeited Property, and the time to do so under 21 U.S.C. § 853(n)(2) has expired;

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED, on consent as follows:

1. Pursuant to Fed. R. Crim. P. 32.2(c)(2), the Preliminary Order of Forfeiture previously entered by this Court is hereby made a Final Order of Forfeiture.

2. All right, title and interest in the Forfeited Property is hereby forfeited to the United States pursuant to 18 U.S.C. § 2253 and 21 U.S.C. § 853(p).

3. The United States Marshals Service and/or the United Postal Investigation Service and its duly authorized agents and contractors are hereby directed to dispose of the Forfeited Property in accordance with all applicable laws and rules.

4. The United States District Court for the Eastern District of New York shall retain jurisdiction in this case for the purpose of enforcing this Order.

5. Pursuant to Fed. R. Crim. P. 32.2(b)(4)(a) and (c), this Final Order shall become final as to the defendant at the time of sentencing and shall be made part of the defendant's sentence and included in the judgment of conviction.

6. The Clerk of the Court is directed to send, by inter-office mail, four certified copies of this Final Order to the United States Attorney's Office, Eastern District of New York, ATTN: Maritza Arroyo, FSA Paralegal, 271 Cadman Plaza East, 7th Floor, Brooklyn, New York 11201.

Dated: Brooklyn, New York
Feb. 1, 2013

SO ORDERED:

_____

HONORABLE STERLING JOHNSON, JR.
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

APPENDIX E — INDICTMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, FILED MARCH 24, 2011

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR11-231
(T. 18, U.S.C., §§ 2252(a)(2), 2252(a)(4)(B), 2252(b)(1), 2252(b)(2), 2253 and 3551 *et seq.*; T. 21, U.S.C., § 853(p))

UNITED STATES OF AMERICA

- against -

AVONDALE LOCKHART,

Defendant.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE
(Attempted Receipt of Child Pornography)

1. In or about and between June 2010 and July 2010, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant AVONDALE LOCKHART did knowingly and intentionally attempt to receive one or more visual depictions using a means and facility of interstate and foreign commerce, and which visual depictions had been

mailed, and shipped and transported in and affecting interstate and foreign commerce, by any means including by computer, the production of such visual depictions having involved the use of one or more minors engaging in sexually explicit conduct, and such visual depictions were of such conduct.

(Title 18, United States Code, Sections 2252(a)(2), 2252(b)(1) and 3551 *et seq.*)

COUNT TWO
(Possession of Child Pornography)

2. On or about July 13, 2011, within the Eastern District of New York, the defendant AVONDALE LOCKHART did knowingly and intentionally possess matter containing one or more visual depictions, to wit: videos and images contained in computer files on a Hewlett Packer g60 laptop computer and a Toshiba 500 GB USB external hard drive, which visual depictions had been mailed, and shipped and transported using a means and facility of interstate and foreign commerce, and in and affecting interstate and foreign commerce, and which were produced using materials which had been mailed and so shipped and transported, by any means including by computer, the production of such visual depictions having involved the use of one or more minors engaging in sexually explicit conduct, and such visual depictions were of such conduct.

(Title 18, United States Code, Sections 2252(a)(4)(B), 2252(b)(2) and 3551 *et seq.*)

Appendix E

CRIMINAL FORFEITURE ALLEGATION

3. The United States hereby gives notice to the defendant that, upon his conviction of any of the charged offenses, the government will seek forfeiture in accordance with Title 18, United States Code, Section 2253, of (a) any visual depiction described in Section 2251, 2251A, 2252, 2252A, 2252B or 2260 of Title 18, United States Code, or any book, magazine, periodical, film, videotape, and other matter produced, transported, mailed, shipped and received in violation of such sections; (b) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from the offense(s) of conviction; and (c) any property, real or personal, used or intended to be used to commit or to promote the commission of the offense(s) of conviction, or any property traceable to such property, including, but not limited to, one Hewlett Packer g60 laptop computer and all hard drives included therein and one Toshiba 500 GB USB external hard drive.

4. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 2253(b), to seek forfeiture of any other property of the defendant up to the value of the forfeitable property described in this forfeiture allegation.

(Title 18, United States Code, Section 2253; Title 21, United States Code, Section 853(p))

APPENDIX F — TRANSCRIPT OF SENTENCING IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, DATED FEBRUARY 1, 2013

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

11-CR-231

UNITED STATES OF AMERICA,

Plaintiff,

-against-

AVONDALE LOCKHART

Defendant.

United States Courthouse
Brooklyn, New York

February 1, 2013
9:30 a.m.

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE STERLING
JOHNSON, JR., UNITED STATES DISTRICT
SENIOR JUDGE

* * *

[2] THE COURT CLERK: United States of America v. Lockhart.

THE COURT: Note your appearances.

MS. MELENDEZ: Good morning, your Honor.

Maria Cruz Melendez for the government. With me here from the Probation Department is Mary Ann Betts.

MS. BETTS: Good morning, your Honor.

MS. WHALEN: Good morning, your Honor.

Federal Defenders of New York by Mildred Whalen for Mr. Lockhart.

THE COURT: Mr. Lockhart, have you read and discussed the presentence report with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Are you ready for sentence?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Let me address some of the legal matters that have been presented to me by the lawyers.

First order of business, let the record reflect that I am in possession of a transcript of a plea by this defendant before Magistrate Judge Go on March 6, 2012, and I accept the plea.

Appendix F

Secondly, I like to state I adopt the finding in the presentence report made by the Probation Department.

One of the main objections by the defendant is the issue of the mandatory minimum that the government says is [3] applicable in this situation, and Ms. Whalen, as usual, is a good lawyer and puts in some very, very good papers. You state or she states, basically, that 18 2252(b)(2) is inapplicable because she states that defendant did not have sexual conduct involving a minor; is that correct?

MS. WHALEN: The prior conviction is not for sexual conduct involving a minor.

THE COURT: And I'm ruling that the plain reading of the statute negates that particular position. The defendant was convicted in state court. When was it, 2000 --.

MS. MELENDEZ: 1999, your Honor.

THE COURT: In 1999, and the situation was where he pinned down a former girlfriend and attempted to place his penis in her vagina. He was convicted of that and received five years probation. That fits within that part of the statute that speaks of a state conviction for aggravated sexual abuse.

Secondly, there is an Eighth Amendment claim.

MS. WHALEN: Yes, Your Honor.

THE COURT: And I will deny that because I think that the statute created by Congress has a legitimate purpose, and it's not unconstitutional.

The guideline range in this particular case is 78 to 97 months. The maximum statute calls for 240 months, but the mandatory minimum, which is triggered by the aggravated [4] sexual abuse after a conviction, is 120 months, which is below the 240 months.

I think, thirdly, Ms. Whalen raises the issue of United States v. Dorvee. This is a different kettle of fish. In Dorvee, the court referred to a situation where the enhancement created a situation where the sentence was greater than the mandatory minimum. In this situation, there is no exceeding the mandatory minimum, therefore, I hold that Dorvee does not apply.

Now, any other objection, Ms. Whalen?

MS. WHALEN: No, Your Honor.

THE COURT: Now, do you agree with the guideline range?

MS. WHALEN: Your Honor, I object to the guideline range as set forth.

THE COURT: I understand that and that's on the record.

MS. WHALEN: But given the court's analysis, I understand that the applicable guideline range would be 120 months.

THE COURT: Okay. Now I will ask Mr. Lockhart, do you wish to say something?

THE DEFENDANT: I just want to say I'm sorry for what I did. I didn't mean to hurt anyone. I was recovering from my kidney transplant and I bought a computer, my first [5] computer, and I ended up on one of those sites. I'm sorry.

THE COURT: Okay. Ms. Whalen?

MS. WHALEN: Your Honor, I think that the mandatory minimum sentence of 120 months would be more than sufficient to achieve the goals of sentencing. I would like to address the medical issues after or I can address them now, if the court wants, in terms of surrender, and my conversations with the Bureau of Prisons about taking care of Mr. Lockhart's medical condition.

THE COURT: Okay. I received something from the government in which -- and maybe -- is it Ms. Melendez?

MS. MELENDEZ: Yes, Your Honor?

THE COURT: I haven't messed your name up yet.

MS. MELENDEZ: Well, technically, your Honor, it is Cruz Melendez, but I answer by Ms. Melendez as well.

THE COURT: Well, I messed it up. Welcome to the club.

Ms. Cruz Melendez sent me a letter. I assume that you got a copy of it. I think it was dated January 17th.

MS. WHALEN: Yes, Your Honor. And when we were last before the court on the 18th, I asked for an opportunity to speak with the Bureau of Prisons about the issue of a lack of a drug called Myfortic which prevents rejection of a transplanted kidney. So Ms. Cruz Melendez provided me Joyce Horikawa's telephone number at the Bureau of Prisons. Ms. [6] Sullivan actually wrote the letter that is attached to the government's January 17th letter, but she is the regional director, and Ms. Horikawa is above her in terms of the Bureau of Prisons.

So when I talked to Ms. Horikawa, I was talking to her about whether or not we can have an examination, because the doctor in the Bureau of Prisons has to actually prescribe the drugs for Mr. Lockhart. So I was asking if there was a way we could arrange for him to appear at the prison, but not actually be designated until they got his medication. What Ms. Horikawa said is that she said that once we receive notification of Mr. Lockhart's designation - and I think everybody agrees that he should self-surrender - she told me that based on his records, he will be designated to what is called a Category Care Level Three Bureau of Prisons in terms of medicine.

THE COURT: Is that Butner?

MS. WHALEN: Either could be Butner. I think it could be Devins. I think it could be Minnesota. There are a couple of them nationwide. She said that once we were notified of the actual designation, we should then forward a complete set of my client's medical records to her. She would then send them to the regional director.

She also said that given the fact that some of his medication was not on formulary, they would allow him to [7] bring a seven-day supply of medication. She said that they now had a 36-hour turnaround for non-formulary medication, but a seven-day supply would cover him in case there were any delays. Then we would also provide them with the name and the contact number of his treating physician to get additional information.

She suggested a Monday, not this Monday, but in the future a Monday surrender date.

THE COURT: I'm going to allow him to surrender, and it will probably be a couple of months.

MS. WHALEN: Okay. I think my understanding is designations are usually taking like one to two months. And since we have to give them the additional medical records, I would ask -- we'll have everything ready to go as soon as the designation is made. So maybe like two and a half months and then we can have two weeks afterwards?

MS. BETTS: The Probation Department would like to state we've had an ongoing problem in this district and other federal courts of suicides after sentencing, but before designation for sex offenders. We'll do everything in our power to expedite all the documents and the judgment and everything sent to the Bureau of Prisons official designation ASAP, and that designation could be as brief as possible because of problems with depression and suicide potential.

MS. WHALEN: Mr. Lockhart is in counseling and he's [8] under electronic monitoring. He lives with another individual, so he's not someone who has extended periods on his own. He's been in counseling, both religious and mental health, addressing this issue. So an expedited date is fine. It's just that if we can set it out for a month.

THE COURT: I will set it out for at least two months, and I would suggest that you work with Ms. Cruz Melendez and Ms. Betts, and we can work something out.

MS. WHALEN: Okay.

THE COURT: I agree that I think the mandatory minimum is sufficient, after considering the factors in 3553(a). So I will sentence the defendant to the custody of the Attorney General or his duly authorized representative for a period of 120 months. $100 special assessment.

What is the supervised release?

MS. BETTS: Any amount of years to life. We had recommended ten.

THE COURT: Ten years supervised release.

I'm also going to recommend mental health and treatment for the defendant while in the custody of the Bureau of Prisons. And as a condition of his supervised release, the Probation Department asks that I include in the J & C a treatment program for sexual disorders, and recommend that the defendant participate in the polygraph examination to obtain information necessary for risk management and [9] correctional treatment.

The defendant will not associate with any children under 18, unless a responsible adult is present and he has prior approval from the Probation Department.

The defendant must register as a sex offender.

MS. MELENDEZ: Your Honor, the government asks that as part of the defendant's sentence, the court pronounce the forfeiture of particular items that contain child pornography, being a Hewlett Packard G-60 laptop computer, and Toshiba 500 gigabyte external hard drive that were seized from the defendant.

THE COURT: Any objection?

MS. WHALEN: We consented to the seizure of those items or the forfeiture of those items.

THE COURT: Okay. They will be forfeited.

Do I have to sign an order?

MS. MELENDEZ: Yes, your Honor. I believe an order was provided, but I have a copy here. We ask that the order be attached to the J & C.

THE COURT: What we can do is to -- today's the 1st, right?

MS. MELENDEZ: Yes, your Honor.

MS. BETTS: Yes.

THE COURT: What we can do is make a copy of this, Ana, and give a copy to Ms. Whalen and to Ms. Cruz Melendez, [10] and then attach a copy to the J & C.

Are there any open counts?

MS, MELENDEZ: Yes, Your Honor, and the government would move to dismiss those counts.

THE COURT: They will be dismissed.

MS. BETTS: The Probation Department would want to inquire with the court if the court would consider a special condition that the defendant not use a computer internet capable device to access pornography of any kind. The definition of pornography being defined in Title 18 United States Code, Section 2256(2), and shall cooperate

with the Probation Department Computer and Internet Monitoring Program to remotely access any computer device.

THE COURT: As a condition of supervised release?

MS. BETTS: Correct.

THE COURT: I will make that recommendation and put it in the J & C.

MS. WHALEN: Your Honor, I haven't done the research with respect to the regular pornography, whether or not that's a constitutional condition.

THE COURT: I think the recommendation is for child pornography. It didn't say regular pornography.

MS. BETTS: It was including regular pornography of any kind.

THE COURT: But constitutionally he can see regular [11] pornography, can't he?

MS. BETTS: It's opposed to treatment plans for sex offender treatment. It doesn't support the treatment plans for sex offender mental health treatment.

MS. WHALEN: If that's a condition of the mental health treatment, maybe we can make it -- if the mental health treatment plan requires no pornography, then that could be a condition of his supervision, because that would be the condition of the mental health treatment?

MS. BETTS: That's feasible, yes.

THE COURT: Will you draft some language, you and Ms. Whalen, and give it to Ana so that she can include it in the J & C?

MS. BETTS: Yes.

MS. WHALEN: So the surrender date would be?

THE COURT: And you will be in touch with the government, when I say the government, I mean Ms. Cruz Melendez, with the prosecutor, and probation.

MS. WHALEN: As well as Ms. Horikawa in the Bureau of Prisons.

THE COURT: Okay.

THE COURT CLERK: April 1st surrender date by I believe it's noon. And it's going to be surrender to the institution?

[12] MS. WHALEN: It will be surrender to the institution.

THE COURT: Okay. Any open counts?

MS. MELENDEZ: Not any more, your Honor. The government moved to dismiss the counts. I believe your Honor ordered that they be dismissed.

THE COURT: Okay. Have a good day.

MS. MELENDEZ: Thank you, Judge.

MS. WHALEN: Thank you.

(The sentencing is concluded.)